

## REMARKS

1        The Examiner objected to claim 7, because the number "1" was erroneously  
placed in line 2, and claim 11, because the term "remarkably" rather than "removably"  
was placed in line 1. Applicants appreciate the Examiner's assistance and have  
corrected the language of claims 7 and 11. The Examiner also objected to claim 9,  
5        stating that there is no antecedent basis for the term "said bottom frame member."  
However, claim 9 ultimately depends from claim 6, which states that the bottom wall is  
comprised of a bottom frame member and a bottom platform. Accordingly, proper  
antecedent basis exists for the subject claim term. Claims 7, 9 and 11 are believed to  
10      be in condition for allowance and the Examiner is respectfully requested to reconsider  
and allow the same.

15      The examiner rejected claims 1 - 7 under 35 U.S.C. § 102(b) as being anticipated  
by U.S. Patent No. 4,682,448 to Healey. Specifically, the examiner states that Healey  
teaches each of the individual limitations found within the rejected claims. This is not  
true. Claim 1 requires that;

20      said first and second support members being positioned to extend  
outwardly from said bottom wall from a common axis that extends through  
said bottom wall proximal a long or a short axis of said bottom wall.  
(emphasis added).

25      To be sure, "axis" is typically defined as "a straight line or structure with respect to  
which a body or figure is symmetrical." Merriam-Webster Dictionary Home and Office  
Edition, at p. 36. The long and short axes are defined in Figure 2 and page 5, lines 17-  
22, through page 6, lines 1-20. These depictions and descriptions are commensurate  
with the accepted definition of "axis." Healey does not teach such a structural

relationship among its support members, which are positioned in the four corners of the device's rectangular base. Accordingly, the supports of the Healey device extend upwardly from points that are the furthest possible distance from a common long or short axis of the bottom wall.

The aforescribed structural difference between the present invention and the Healey device provides the present invention with distinct advantages over the Healey device. Page two of the specification specifically calls-out the Healey device, stating:

While the Healey containment unit provides assistance in containing the debris, it suffers from a number of shortcomings. First, the structure of the frame assembly is not provided in such a manner that it can be easily disassembled into a plurality of smaller component parts for ease of storage or transport. Second, the frame assembly is designed in such a manner that it is difficult for a single user to adjust and operate.

The specification continues, at pages five and six, stating that:

Due to the fact that only two elongated support members are provided in the design of the frame assembly 12, it is preferred that the first and second elongated frame members 24 and 30 engage the bottom wall 16 at coupling points that share a common axis, which extends through the bottom wall 16 adjacent a long axis "A", as depicted in Figure 2. However, the first and second elongated support members 24 and 30 could also be positioned so that the common axis extends through the bottom wall 16 adjacent a short axis "B" of the bottom wall 16. In either arrangement, the elongated support members 24 and 30 provide stable support to the upper frame member 22. It is contemplated that the elongated support members 24 and 30 do not need to extend outwardly from points resting directly on the long axis "A" (or short axis "B"). Rather, the elongated support members 24 and 30 could engage the bottom wall 16 a short distance away from the long axis "A" (or short axis "B"). However, as the elongated support members 24 and 30 are positioned further away from the long axis "A" (or short axis "B"), the bottom wall 16 and the upper frame member 22 will cantilever a greater distance from the elongated support members 24 and 30 in one direction, which could increase the likelihood of instability. (emphasis added).

1           Page eight of the specification then states that:

5           Due to the fact that only two support members are used, a pair of gripping members 50 and 52 can be secured to the extension portions 44 and 48, respectively. It is contemplated that the gripping members 50 and 52 could simply be provided as rigid handles, knobs, flexible straps, or the like. In this manner, a user can simply grip one or both of the gripping members 50 and 52 and raise the extension portions 44 and 48 and the upper frame member 22 to the desired height.

10          Page nine of the specification states that, "the simple design of the frame assembly 12 permits the quick assembly and disassembly of the same by a single user." Moreover, the reduction of parts, which is achieved by the position of the support members, reduces weight and storage room required, while increasing simplicity of use.

15          Anticipation under 35 U.S.C. § 102 focuses on the questions of whether or not a claim reads on the product or process disclosed by a prior art reference, not what the reference broadly "teaches." Kalman v. Kimberly-Clarke Corp., 713 F.2d 760 (Fed. Cir. 1983). "For a prior art reference to anticipate in terms of 35 U.S.C. § 102, every element of the claimed function must be identically shown in a single reference." Diversitech Corp. v. Century Steps, Inc., 850 F.2d 675 (Fed. Cir. 1988); Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) (A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference). The differences between the Healey device and the applicants' device, as claimed in claim 1, are significant. Accordingly, claim 1 is believed to be allowable over the prior art. Claims 2-7 each ultimately depend from claim 1 and are believed to be allowable for at

least the reasons set forth herein with respect to claim 1. Applicants respectfully  
1 request the Examiner to reconsider the aforementioned rejections and allow claims 1-7.

Claim 4 further requires that, "the first portions of said first and second support  
5 members are provided with gripping means for selective manipulation by a user to  
telescopically set a desired length for said first and second support members." This  
limitation describes insufficient structure for performing the recited function (for selective  
manipulation by a user to telescopically set a desired length for said first and second  
support members). Accordingly, the limitation must be construed under 35 U.S.C. §  
10 112(6). However, the Examiner has not properly conducted the limitations in  
accordance with 35 U.S.C. § 112(6), as mandated by the MPEP (2181-84) and Federal  
Circuit case law. Rather, the Examiner summarily concludes that the Healey device is  
provided with a gripping means in the form of the outer surface of the upper support  
members. Such conclusory statements without the proper analysis are improper. In re  
15 Donaldson Co., 29 USPQ2d 1845 (Fed. Cir. 1994).

In order to meet a "means-plus-function" limitation, the prior art must: (1) perform  
the identical function recited in the means limitation; and (2) perform that function using  
the structure disclosed in the specification or an equivalent structure. Cf. Carroll Touch  
Inc. v. Electro Mechanical Sys. Inc., 15 F.3d 1573, 1578, 27 USPQ2d 1836, 1840 (Fed.  
20 Cir. 1994); Valmont Indus. Inc. v. Reinke Mfg. Co., 983 F.2d 1039, 1042, 25 USPQ2d  
1451, 1454 (Fed. Cir. 1993). Johnston v. IVAC Corp., 885 F.2d 1574, 1580, 12  
USPQ2d 1382, 1386 (Fed. Cir. 1989). Accordingly, in ascertaining that a "means-plus-  
function" limitation is met by the prior art, an examiner must: (1) determine that the prior  
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art performs the identical function recited in the means limitation; (2) identify every  
1 structure described in the patent specification that corresponds to the claimed function;<sup>4</sup>  
(3) identify the structure in the prior art that performs the claimed function; (4) determine  
if the structure in the prior art that performs the claimed function is the same as any  
5 structure described in the patent specification that corresponds to the claimed function;  
and if not (5) determine if the structure in the prior art that performs the claimed function  
is equivalent to any structure described in the patent specification that corresponds to  
the claimed function.

Manual of Patent Examining Procedure (MPEP) § 2183 provides that if the  
10 examiner finds that a prior art element (A) performs the function specified in the claim,  
(B) is not excluded by any explicit definition provided in the specification for an  
equivalent, and (C) is an equivalent of the means plus function limitation, the Examiner  
should provide an explanation and rationale in the Office action as to why the prior art  
15 element is an equivalent.<sup>5</sup>

In this case, the Examiner has not, with regard to claim 1: (i) identified every  
structure described in the patent specification that corresponds to the claimed function;

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20       <sup>4</sup> Structure disclosed in the specification is corresponding structure only if the specification or  
prosecution history clearly links or associates that structure to the function recited in the claim. Medtronic,  
Inc. v. Adv. Cardiovascular Sys., Inc., 248 F.3d 1303, 1311, 58 USPQ2d 1607, 1613 (Fed. Cir. 2001).

25       <sup>5</sup> The four tests set forth in MPEP § 2183 for determining whether or not a prior art element is an  
equivalent to the corresponding element disclosed in the specification are (A) the prior art element  
performs the identical function specified in the claim in substantially the same way, and produces  
substantially the same results as the corresponding element disclosed in the specification; (B) a person of  
ordinary skill in the art would have recognized the interchangeability of the element shown in the prior art  
for the corresponding element disclosed in the specification (C) there are insubstantial differences  
between the prior art element and the corresponding element disclosed in the specification; and (D) the  
prior art element is a structural equivalent of the corresponding element disclosed in the specification.

(ii) determined if the structure in the prior art that performs the claimed function is the same as any structure described in the patent specification that corresponds to the claimed function; and (iii) determined if the structure in the prior art that performs the claimed function is equivalent to any structure described in the patent specification that corresponds to the claimed function. As such, the Examiner has not yet sustained the Examiner's burden of establishing that the prior art anticipates claim 4.

Applicants' specification identifies a few structural arrangements that perform the recited function. Specifically, at page 8, lines 5-9, applicants describe their alternate embodiments as follows:

a pair of gripping members 50 and 52 can be secured to the extension portions 44 and 48, respectively. It is contemplated that the gripping members 50 and 52 could simply be provided as rigid handles, knobs, flexible straps, or the like. In this manner, a user can simply grip one or both of the gripping members 50 and 52 and raise the extension portions 44 and 48 and the upper frame member 22 to the desired height.

Healey teaches no such structural members for performing the recited function and, as such, cannot anticipate claim 4.

Similarly, claim 5 requires "receiving means for at least partially receiving said gripping means when said first and second support members are adjusted between said extended and retracted positions." This limitation describes insufficient structure for performing the recited function (or at least partially receiving said gripping means when said first and second support members are adjusted between said extended and retracted positions). Accordingly, the limitation must be construed under 35 U.S.C. § 112(6). However, the Examiner has not properly conducted the limitations in accordance with 35 U.S.C. § 112(6), as mandated by the MPEP (2181-84) and Federal

Circuit case law. Rather, the Examiner summarily concludes that the inner surface of  
1 the lower supports of the Healey device provide a “receiving means.” This conclusory  
statement is improper. In re Donaldson Co., 29 USPQ2d 1845 (Fed. Cir. 1994).

Applicants' specification identifies a few structural arrangements that perform the  
5 recited function. Specifically, at page 8, lines 10-14, applicants describe their alternate  
embodiments as follows:

Where the extension portions 44 and 48 are made to telescope within the  
base portions 42 and 46, as depicted in Figure 2, channels 54 and 56 can  
be formed within the base portions 42 and 46 to at least partially receive  
the gripping members 50 and 52 to allow their passage along the length of  
the bottom portions 42 and 46.

10 Healey teaches no such structural members for performing the recited function and, as  
such, cannot anticipate claim 5.

The Examiner rejected claims 8-20 under 35 U.S.C. § 103(a) as being  
unpatentable over the Healey patent in further view of U.S. Patent No. 6,783,563 to  
15 Eckhoff, et al. The Examiner states that the Healey patent teaches each of the  
elements set forth within these claims except for the limitation that the support members  
are removably coupled to the upper frame and bottom platform or that the support  
members extend from a point proximal the center of the edge portions. The Examiner  
claims that the Eckhoff patent teaches a structure having these limitations and that it  
20 would have been obvious at the time of the invention to one having ordinary skill in the  
art to combine the Eckhoff and Healey teachings in a manner that would produce the  
claimed invention.

Applicants respectfully traverse the Examiner's rejections, in part, because the  
1 Eckhoff, et al. reference cannot be considered prior art under § 103(a). A 35 U.S.C.  
103 rejection is based on 35 U.S.C. 102(a), 102(b), 102(e), etc. depending on the type  
of prior art reference used and its publication or issue date. See, MPEP 2141.01. The  
5 date the patent is available as a reference is generally the date that the patent becomes  
enforceable. See, MPEP 2126. This date is the date the sovereign formally bestows  
patents rights to the applicant. *In re Monks*, 588 F.2d 308, 200 USPQ 129 (CCPA  
1978). The Eckhoff, et al. reference issued on August 31, 2004 and was not published  
or otherwise made publicly available prior thereto. Applicants filed their application on  
10 April 14, 2004, and thus at least constructively reduced their invention to practice on  
that date. Hence, at the time applicants derived their invention, the Eckhoff, et al.  
reference would not have been known or otherwise available to a person of ordinary  
skill in the art. Claims 8-20 are, therefore, believed to be patentable and  
15 reconsideration of the same is respectfully requested.

Additionally, the means-plus-function discussion above, relative to claims 4 and 5  
and the Healey reference, is equally applicable to the Examiners rejections of claims 13,  
14, 18 and 19. Accordingly, said discussion is incorporated herein as if fully set forth.

A Request for One-Month Extension of Time and the required fees therefore are  
20 being submitted with this Amendment. No other fees or extensions of time are believed  
to be due in connection with this amendment beyond those requested and paid for  
herewith; however, please consider this a request for any additional extension  
inadvertently omitted, and charge any additional fees to Deposit Account No. 502093.

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Respectfully submitted,



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**CERTIFICATE OF MAILING**

I hereby certify that the original of this AMENDMENT for STEVE P. KANNE, ET AL., Serial No. 10/824,521, was mailed by first class mail, postage prepaid, to Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 17<sup>th</sup> day of October, 2006.

~~SHANE M. NIEBERGALL~~